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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DUANE YOUNGBERG, *et al.*,
Petitioners,
v.
NICHOLAS ROMEO, an incompetent, by his Mother and Next Friend, PAULA ROMEO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICI CURIAE* AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, MENTAL HEALTH ASSOCIATION AND NATIONAL ASSOCIATION OF SOCIAL WORKERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici curiae are organizations of mental retardation and mental health professionals and citizens who are concerned with the legal rights of mentally retarded people [1]

[1] *Amici* include:

(1) The Association for Retarded Citizens of the United States, a voluntary organization devoted to promoting the welfare of mentally retarded people with approximately 300,000 members;

(2) The American Orthopsychiatric Association, an interdisciplinary organization of 8,000 members, including psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes and treatment of abnormal behavior;

[Footnote continued on page 2]

to receive appropriate care and habilitation in institutions.[2] *Amici* have in common a strong commitment to the provision of educational, psychological, medical and social services which will afford mentally retarded persons safe and decent living conditions and an opportunity to function as fully and normally as their capacity permits.

Many members of the *amici* organizations practice in residential facilities to which mentally retarded people are committed. These professionals are primarily responsible for assessing the needs of residents, designing treatment or habilitation plans to meet these needs and providing the appropriate clinical and other services necessary to carry out such individual plans.

As experienced professionals and concerned citizens, *amici* wish to provide the Court with information concerning the nature of mental retardation and its amelioration and to support the positions both of the respondent and of the Third Circuit Court of Appeals in its decision below.

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[1] [Continued]

(3) The American Psychological Association, a professional and scientific association with a membership of approximately 50,000 psychologists, many of whom practice in public institutions;

(4) The Mental Health Association, a citizens' organization of one million lay and professional members whose primary purpose is to encourage efforts to prevent mental illness, promote mental health and provide better services for the mentally disabled;

(5) The National Association of Social Workers, the world's largest organization of professional social workers with 85,000 members in chapters throughout all 50 states, devoted to advancement of sound public policy and promotion of high standards of social service practice and care.

[2] In this brief, the education, training and care used to improve the intellectual functioning and adaptive behavior of mentally retarded people are called "habilitation" rather than "treatment". "Treatment" refers to therapeutic or curative procedures administered to persons under a medical model. Because mental retardation cannot be eliminated or cured through treatment, its amelioration through education and training is called "habilitation".

The parties to this suit have consented to the filing of this brief. Their letters are being filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

This case requires the Court to determine the rights and interests of a mentally retarded person who has been involuntarily confined in an institution not because he has been convicted of a crime or because he is dangerous, but because he was found mentally disabled and in need of care and habilitation. *Amici* join respondent in asserting that such people have a constitutionally protected right to appropriate habilitation, a right to adequate protection from harm, including self-abuse and assault by other residents, and a right not to be shackled or restrained without justification.

Respondent has a constitutional right to habilitation as well as care because the state may not arbitrarily withhold his statutorily created interest in the receipt of habilitation and because the promise and provision of habilitation are necessary to the constitutionality of his civil commitment. Basic to both propositions is the fact that although, like other mentally retarded people, respondent has limited intellectual function and has not acquired certain behaviors, he can be taught more appropriate behavior and self-help skills through proper education and training. Under Pennsylvania law, the express purpose of civil commitment is to provide mentally disabled people with both care *and* habilitation. To argue that after commitment the state need provide only care is to ignore the plain language of the Pennsylvania commitment statute. Having thus granted respondent a right to receive habilitation while confined, due process requires that Pennsylvania not arbitrarily deny him habilitation. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

Furthermore, the state's failure to provide habilitation which is acceptable in light of current professional knowledge undermines the constitutional basis for respondent's civil commitment itself. The massive deprivation of lib-

erty resulting from civil commitment can be justified only by an overriding state interest in confining the individual. The interests historically asserted are the state's interest in protecting society from dangerous individuals and in promoting the interests of persons unable to care for themselves. Since in this case there has been no finding that respondent is dangerous, the state's interest is that of promoting the individual's interests.

This purpose cannot be accomplished without the provision of habilitation as well as care for several reasons. First, unless they are provided with the stimulation and instruction of appropriate habilitation programs, institutionalized mentally retarded people lose skills with which they came to the institution. Second, without habilitation, mentally retarded people living in institutions often become aggressive and self-abusive. Finally, in the absence of habilitation, the commitment of a mentally retarded person is a life sentence with almost no possibility of release. But with habilitation, institutionalized mentally retarded people become more self-sufficient, thereby increasing their liberty and autonomy within the institution and the possibility of their return to life in the community. Therefore, conditions of confinement which do not include the provision of habilitation bear no reasonable relation to the permissible purposes of confinement and are violative of the Constitution's due process requirements. *Jackson v. Indiana*, 406 U.S. 715 (1972).

Even if habilitation were not a constitutionally necessary purpose for civil commitment of mentally retarded people, it must be provided once the state has taken a mentally retarded person into custody. Regardless of the reasons for confinement and their constitutionality (which are not challenged in this case), when the state has assumed custody of a noncriminal mentally retarded person, it has a constitutional obligation to protect him from harm. The eighth amendment protects prisoners from cruel and unusual punishment, including serious deprivation of basic human needs. *Rhodes v. Chapman*, 49 U.S.L.W. 4677 (U.S. June 15, 1981) (No. 80-332). Due

process protects noncriminal inmates of mental retardation facilities from no less. And most basic to mentally retarded people is their need for improved intellectual and social functioning, which can be met through appropriate education and training. Without such habilitation, they will regress. In addition, the state's obligation to protect mentally retarded people in state custody from harm includes its obligation to protect them against self-abuse and attacks from other residents. This obligation, too, can be met through appropriate habilitation programs.

Finally, even without a right to protection from harm, noncriminal persons confined by the state have a right under the due process clause to be free from punishment. *Bell v. Wolfish*, 441 U.S. 520 (1979). This right is violated where, without justification, the state imposes harsh conditions, such as shackling or an unsafe environment, to accomplish purposes that could be achieved through less harsh means.

Amici also support this Court's decision in *Wood v. Strickland*, 420 U.S. 308 (1975), establishing qualified immunity to state officials working in public facilities.

ARGUMENT

I. MENTAL RETARDATION IS NOT A MENTAL ILLNESS BUT A FUNCTIONAL DISORDER SUSCEPTIBLE TO IMPROVEMENT THROUGH TRAINING AND EDUCATION.

A. Mental Retardation Involves Slow or Limited Intellectual Functioning, Accompanied by Deficits in Adaptive Behavior.

Mental retardation is a term which refers to a wide number of conditions resulting in subaverage intellectual functioning accompanied by deficits in adaptive behavior.[3] A diagnosis of mental retardation is made on several criteria, including measured intelligence (IQ tests), adap-

[3] *See* H. GROSSMAN, MANUAL OF TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION (1973).

tive behavior level and medical classification.[4] Fundamentally, the characteristic which distinguishes mentally retarded people is their failure to learn things that their intellectually normal peers have learned.[5] They are unable to recognize cues and stimuli from their environment as appropriate guides to behavior.[6]

In this country, people are not considered retarded unless they score in the lowest two percent of the population on standardized intelligence tests.[7] It is estimated that about three percent of the population of the United States—about 6 million people—will at some time in their life function in the mentally retarded range.[8]

More than 250 causes of mental retardation have been identified to date. Mental retardation may follow or be associated with infection and intoxication, trauma or physical agents, disorders of metabolism or nutrition, gross post-natal brain disease, chromosomal abnormali-

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[4] Roos, *Basic Facts About Mental Retardation*, in LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 127, 131 (P. Friedman ed. 1979).

[5] Bigelow, *The Behavioral Approach to Retardation*, in BEHAVIOR MODIFICATION OF THE MENTALLY RETARDED 17 (T. Thompson & J. Grabowski eds. 1972).

[6] H. LELAND & D. SMITH, MENTAL RETARDATION: PRESENT AND FUTURE PERSPECTIVES 6 (1974).

[7] Grossman, *supra* note 3.

[8] Tarjan, *et al., Natural History of Mental Retardation: Some Aspects of Epidemiology*, 77 AM. J. MENTAL DEFICIENCY 369-79 (1973). Probably no more than 1% of the population, or 2 million Americans, are technically mentally retarded at any given time. *Id.* A 1976 review of epidemiological studies revealed that estimates of the rate of mental retardation varied from less than 1% to almost 20%, depending primarily on methodological, sampling and definitional differences among the studies. Conley, *Mental Retardation—An Economist's Approach*, 14 MENTAL RETARDATION ser. 6, at 20-24 (1976). The peak period of identification is between the ages of 6 and 12, and about two-thirds of the individuals diagnosed as mentally retarded lose their labeling during late adolescence or early adulthood.

ties, premature birth or environmental influences.[9] As would be expected, "mental retardation" describes people with a wide variety of characteristics and abilities.[10] The vast majority are capable of living and do live outside of institutions. Fewer than 200,000 of the nation's mentally retarded citizens are residents of public institutions for the retarded.[11] Most are admitted to institutions as teenagers; many stay for decades.[12]

Historically, mentally retarded people have been variously viewed as subhuman beings, deserving to be treated much like animals, as menaces requiring prison-like confinement for the protection of society, as eternal children needing to be overprotected and humored and as hopelessly "sick" patients needing hospitalization and medical services.[13] These conceptions all supported the development of segregated custodial institutions for the retarded in the early decades of this century.[14]

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[9] P. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS (1976), *citing* Hughes, *Definition, Diagnosis, Classification and Associated Problems in Mental Retardation*, 1 L. & PSYCH. REV. 17, 20-21 (1975).

[10] The American Association on Mental Deficiency recognizes four levels of retardation: "mildly retarded," generally regarded as capable of economic self-sufficiency; "moderately retarded," regarded as capable of productive employment in sheltered-worshop arrangements; "severely retarded"; and "profoundly retarded." Roos, *supra* note 4, at 131-32.

[11] COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS, RETURNING THE MENTALLY DISABLED TO THE COMMUNITY: GOVERNMENT NEEDS TO DO MORE 9 (1977).

[12] *See* Butterfield, *Some Basic Changes in Residential Facilities*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 15, 22-23 (R. Kugel & A. Shearer eds. 1976) [hereinafter cited as "CHANGING PATTERNS"].

[13] Roos, *supra* note 4, at 130.

[14] F. MENOLASCINO, CHALLENGES IN MENTAL RETARDATION 46-48 (1977); Wolfensberger, *The Origin and Nature of Our Institutional Models*, in CHANGING PATTERNS 35.

However, World War II brought new awareness of the prevalence of mental retardation and new compassion for physically and mentally handicapped people.[15] At the same time, studies revealed the debilitating effects of rigidly ordered institutional life. It was discovered that prolonged stays in institutions reduced cognitive and social ability.[16] In the 1960s mental retardation was increasingly recognized for what it is: a problem with learning. This awareness supported the need to improve the learning processes of mentally retarded people—to educate and train them to better cope and function in their environment.

> [T]he overall thrust of modern habilitation is the remediation of the delayed learning process so as to develop the maximum growth potential by the acquisition of self-help, language, personal, social, educational, vocational, and recreational skills.[17]

This concept underlies the Developmental Disabilities Assistance and Bill of Rights Act,[18] the Education for All Handicapped Children Act[19] and the standards for retardation facilities promulgated under the Medicaid program,[20] as well as judicial decisions finding a right to education for mentally retarded people.[21]

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[15] E. GINZBERG & D. BRAY, THE UNEDUCATED 41-42 (1953).

[16] Begab, *The Mentally Retarded and Society: Trends and Issues*, in THE MENTALLY RETARDED AND SOCIETY: A SOCIAL SCIENCE PERSPECTIVE 3, 19 (M. Begab & S. Richardson eds. 1975).

[17] Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Interface*, 10 CREIGHTON L. REV. 124, 139-40 (1976).

[18] 42 U.S.C. §§ 6000-6081 (1976). *See* 42 U.S.C. § 6010(2) (1976).

[19] 20 U.S.C. §§ 1401-1461 (1976). *See* 20 U.S.C. §§ 1412 (1) & (2)(C) (1976).

[20] 42 U.S.C. § 1396d(d); 42 C.F.R. §§ 442.434 & .435.

[21] *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Association for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971).

B. Although They Learn Slowly, Mentally Retarded People Can Learn.

Since the 1960s, retardation professionals have developed new methods for assessing capabilities of even the most seriously disabled individuals.[22] The result has been a dramatic reassessment of the learning potential of severely and profoundly retarded individuals. There is now extensive documentation of the improvement which can be achieved by severely and profoundly retarded persons in self-help skills, reduction of undesirable behaviors, language skills, social skills and vocational skills as a result of appropriate instructional techniques.[23]

Some experts believe that the acquisition of skills by mentally retarded people may be a function more of the kind of instructional programming, environment and intellectual stimulation provided to them than of their limited mental ability.[24] As a group, mentally retarded people by definition suffer from a deficit in intellectual ability, and the great weight of professional opinion is

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[22] Berkson & Landesman-Dwyer, *Behavior Research in Severe and Profound Mental Retardation (1955-1974)*, 81 AM. J. MENTAL DEFICIENCY 428 (1977).

[23] *See, e.g.*, Osarchuk, *Operant Methods of Toilet Training of Severely and Profoundly Retarded: A Review*, 7 J. SPEC. ED. 423 (1973) (proper toileting); Murphy, Nunes & Hutchings-Ruprecht, *Reduction of Stereotyped Behavior in Profoundly Retarded Individuals*, 82 AM. J. MENTAL DEFICIENCY 238 (1977) (reducing stereotyped behaviors); Booth, *Early Receptive Language Training for the Severely and Profoundly Retarded*, 9 LANGUAGE, SPEECH AND HEARING SERVICES IN SCHOOLS 151 (1978) (general language skills); Bellamy, Peterson & Close, *Habilitation of the Severely and Profoundly Retarded: Illustrations of Competence*, 10 ED. AND TRAINING OF MENTALLY RETARDED 174 (1975) (general vocational tasks). *See also* Bronston, *Matters of Design*, in ACHIEVEMENTS IN RESIDENTIAL SERVICES FOR PERSONS WITH DISABILITIES: TOWARD EXCELLENCE 7 (T. Apollini, J. Cappuccilli & T. Cooke eds. 1980); *Welsch v. Likins*, 373 F. Supp. 487, 495 (D. Minn. 1974), *modified*, 550 F.2d 1122 (8th Cir. 1977).

[24] Sontag, Dodd & Button, *The Education and Community Support of Severely Handicapped People*, 6 INT'L J. MENTAL HEALTH 35, 36 (1977); Bronston, *supra* note 23; Berkson, *supra* note 22.

to the effect that the functional level of most severely and profoundly retarded people can be improved through proper education.[25]

C. Without Instructional Programs, Institutionalized Mentally Retarded People Lose Skills and Often Become Aggressive and Self-Abusive.

Mental retardation professionals long ago discovered that when mentally retarded people live for extended periods of time in impersonal, routinized surroundings with neither individual attention nor freedom to make decisions, they regress and lose abilities they had when they came to the institution. Professional literature sets forth extensive evidence that residents of institutions suffer decreases in such significant areas as intelligence quotient, motor skills, social competence and verbal skills.[26] This decrease in functional level is the result of lack of stimulation and practice in using already-acquired skills.[27] It is ironic that persons who are confined to an

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[25] *See* note 23, *supra*.

[26] *See* Teitelbaum & Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAM. L.Q. 153 (1978); Vogel, *Effects of Environmental Enrichment and Environmental Deprivation on Cognitive Functioning in Institutionalized Retardates*, 31 J. CONSULTING PSYCH. 570 (1967); Guthrie, Butler & Gorlow, *Personality Differences Between Institutionalized and Non-institutionalized Retardates*, 67 AM. J. MENTAL DEFICIENCY 543 (1963); Mitchell & Smeriglio, *Growth in Social Competence in Institutionalized Mentally Retarded Children*, 74 AM. J. MENTAL DEFICIENCY 666 (1970); Schlanger, *Environmental Influences on the Verbal Output of Mentally Retarded Children*, 19 J. SPEECH & HEARING DISORDERS 339 (1954); Lyle, *The Effect of an Institutional Environment Upon the Verbal Development of Imbecile Children—Part II*, 4 J. MENTAL DEFICIENCY RESEARCH 1 (1960).

[27] A federal district court expressly found such regression among Pennhurst residents. *Halderman v. Pennhurst State School & Hospital*, 466 F. Supp. 1295, 1322 (E.D. Pa. 1978), *modified*, 612 F.2d 84 (3d Cir. 1979) (*en banc*), *rev'd on other grounds*, 49 U.S.L.W. 4363 (U.S. April 20, 1981) (Nos. 79-1404, -1408, -1414, -1415, -1489).

institution because they are thought helpless to improve their ability to function in fact learn helplessness there.[28]

In addition to becoming functionally incapacitated, residents of institutions that lack stimulation and training become hostile and aggressive in their boredom. Perhaps in frustration, perhaps to gain staff attention, perhaps in a confused effort to create the stimulation lacking in their environment, institutionalized mentally disabled people often become self-abusive and assaultive.[29] Biting and head-banging are common institutional problems. Yet studies have shown that such behavior decreases dramatically when programs are introduced teaching residents to dress, feed and clothe themselves, to write and draw, to play games and to speak.[30] There is nothing revolutionary about the conclusion that instructional programs help to prevent or stop aggressive behavior. Common sense and experience indicate that when time is taken up with constructive activities residents have less time and inclination to engage in destructive behavior.

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[28] The term "learned helplessness" has been used to describe the process by which institutional residents become functionally incapacitated as a result of their prolonged confinement. DeVellis, *Learned Helplessness in Institutions*, 15 MENTAL RETARDATION 10, ser. 5 (1977). *See also* N. HOBBS, THE FUTURES OF CHILDREN 124-55 (1975); Stimson, *et al.*, *Effects of Early Institutionalization on Growth and Development of Young Children With Down's Syndrome*, 67 MICH. MED. 1213 (Oct. 1968); Lyle, *supra* note 26.

[29] Bigelow and Griffiths, *An Intensive Teaching Unit For Severely and Profoundly Retarded Women*, in BEHAVIOR MODIFICATION OF THE MENTALLY RETARDED 99 (T. Thompson & J. Grabowski eds. 1972); Grabowski & Thompson, A *Behavior Modification Program for Behaviorally Retarded Institutionalized Males*, in BEHAVIOR MODIFICATION OF THE MENTALLY RETARDED 77, 91-94 (T. Thompson & Grabowski eds. 1972); Guthrie, Butler and Gorlow, *supra* note 26.

[30] *See, e.g.*, Foxx & Azrin, *Restitution: A Method of Eliminating Aggressive-Disruptive Behavior of Retarded and Brain Damaged Patients*, 10 BEHAVIOR RESEARCH & THERAPY 15 (1972); *see* note 29, *supra*.

D. With Instructional Programs, Many If Not All Institutionalized Mentally Retarded People Can Return to the Community.

The view is unfounded that mentally retarded people are nonfunctioning and medically dependent individuals who cannot survive without a protective institutional environment. We know that such persons can learn useful behaviors and, further, we know that, having learned minimal self-help and social skills, they can live successfully in the community. Studies of large numbers of severely and profoundly retarded people placed in noninstitutional residential facilities reveal that successful placement depends not primarily on their IQs but principally on the quality and kind of supporting services provided: social work services, homemaker services, recreation, etc.[21] Even institutional residents who have medical needs and limited mobility can be placed in community settings when special supports are provided.[22]

In sum, we know that adaptive behaviors can be learned which will better equip mentally retarded people to live in the community. The vast majority of institutionalized mentally retarded people can be restored to the freedom of contemporary community living with proper instruction and education.

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[21] McCarver & Craig, *Placement of the Retarded in the Community: Prognosis and Outcome*, 7 INT'L REVIEW OF RESEARCH IN MENTAL RETARDATION 145, 168-78 (1974); Heal, Sigelman & Switsky, *Research on Community Residential Alternatives for the Mentally Retarded*, 9 INT'L REVIEW OF RESEARCH IN MENTAL RETARDATION 209 (1978); *see also* Bell, *IQ as a Factor in Community Life Style of Previously Institutionalized Retardates*, 14 MENTAL RETARDATION ser. 3, at 29 (1976).

[22] Provencal, *The Macomb-Oakland Regional Center*, in ACHIEVEMENTS IN RESIDENTIAL SERVICES FOR PERSONS WITH DISABILITIES: TOWARD EXCELLENCE 19, 25 (T. Apolloni, J. Cappuccilli & T. Cooke eds. 1980).

II. A NONCRIMINAL MENTALLY RETARDED PERSON CONFINED IN A PENNSYLVANIA FACILITY HAS A STATE STATUTORY RIGHT TO CARE AND HABILITATION, WHICH IS PROTECTED AGAINST ARBITRARY ABROGATION BY THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

Respondent Nicholas Romeo was confined pursuant to § 4406 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, which expressly provides that:

> If, upon examination, it is determined that such person is in need of care at a facility, the examining physicians or director, as the case may be, shall immediately report to said court which may *order the commitment* of such person *for care and treatment.*

Pa. Stat. Ann. tit. 50, § 4406(b) (emphasis added).

All parties agree that Pennsylvania state law gives mentally retarded people in state residential facilities a right to humane care. Brief for Petitioners at 14-19 [hereinafter cited as "Pet. Br."]. However, the petitioners in this case contend that Pennsylvania state law mandates only care and not treatment. *Id.* *Amici* disagree with petitioners and believe Pennsylvania's law explicitly gives a right to both care and, in the language of the statute, treatment. In support of their contention, petitioners cite an inapplicable section of the Pennsylvania statute, § 4406(a), which applies only to the period during which prospective committees are being examined. They ignore the language of § 4406(b), which clearly establishes the purposes for which a court may order commitment of such persons. Indeed, two Pennsylvania federal district courts followed the plain language and clear legislative history of the statute in ruling that § 4406(b) requires the provision of treatment. *Eubanks v. Clarke*, 434 F. Supp. 1022, 1026-27 (E.D. Pa. 1977); *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1322 (E.D. Pa. 1978), *modified*, 612 F.2d 84 (3d Cir. 1979) (*en banc*), *rev'd on other grounds*,

49 U.S.L.W. 4363 (U.S. April 20, 1981) (Nos. 79-1404, -1408, -1414, -1415, -1489).

Such a clear state-given right creates a constitutionally protected liberty interest. *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).[23] For example, in *Wolff* a state statute created a system of good-time credits whereby prisoners could shorten the length of their confinement and be restored to liberty. This Court held that having created such a system, the state must respect procedural due process requirements in the granting and withholding of such credits. Again, in *Vitek*, a state statute gave prisoners a liberty interest in not being subjected to the stigma attached to hospitalization in a mental institution and not being subjected to mandatory psychiatric treatment except upon certain findings of fact. This Court held that the due process clause of the federal Constitution requires that procedural due process be followed before that state-created interest could be infringed. Analogous to good-time credits, Pennsylvania's statutory promise of care and treatment creates an interest in the restoration of liberty, for only with care and treatment (*i.e.*, habilitation) do Nicholas Romeo and other institutionalized mentally retarded people have any realistic chance of returning to life in the community or of gaining more autonomy within the institution. *See* subsections I, B, and I, D, *supra*.

This liberty interest in the receipt of habilitation is protected against arbitrary infringement by the state. As stated in *Wolff*, "[t]he touchstone of due process is protection of the individual against arbitrary action of the government." *Wolff v. McDonnell*, 418 U.S. at 558. Clearly nothing is more arbitrary than depriving someone of his liberty for the purpose of care and then confining

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[23] Even if the state-created interest in the receipt of care and treatment is regarded as a property interest in receiving an affirmative benefit from the state rather than a means of returning to freedom, it is protected by due process. *Wolff v. McDonnell*, 418 U.S. at 557-58.

him in highly dangerous and frightening conditions where he suffers great harm. Similarly, it is arbitrary to deprive a person of his liberty for the purpose of habilitation and then deny him available habilitation programs. Romeo indisputably received 77 injuries while at Pennhurst, resulting from attacks by other residents as well as self-abuse, and allegedly was denied habilitation for months at a time, although petitioners concede that adequate staff and appropriate programs were available. Tr. 5-173, 6-21, 6-135-36.

III. EVEN WITHOUT AN EXPRESS STATUTORY GUARANTEE, A NONCRIMINAL MENTALLY RETARDED PERSON IN A STATE FACILITY HAS A RIGHT TO CARE AND HABILITATION DIRECTLY UNDER THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

A. Care and Habilitation Are Each Constitutionally Necessary Purposes for Commitment of Mentally Retarded People and, Where the State Has Exercised Its Commitment Power, Due Process Requires That It Provide Both Care and Habilitation.

1. *Respondent's Involuntary Civil Commitment Abridges His Constitutionally Protected Liberty.*

In addition to abridging the most basic aspect of constitutional liberty—the right to be free from physical confinement—involuntary commitment severely limits the exercise of other constitutional rights such as the right to privacy and personal autonomy, *Roe v. Wade*, 410 U.S. 113 (1973); the right to association, *Shelton v. Tucker*, 364 U.S. 479 (1960); the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); the "right to work for a living in the common occupations of the community," *Truax v. Raich*, 239 U.S. 33 (1915); and the right to movement, *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

As this Court has recently commented: "Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). Such massive

interference with personal liberties can be reconciled with the due process clause only if it can be justified in terms of an overriding governmental interest. *Roe v. Wade*, 410 U.S. 113 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The petitioners are mistaken in their assertion that the liberty interest at stake at the time of civil commitment is not a fundamental interest. Pet. Br. at 16. The interest in being left alone to live freely in society has long been recognized as the essence of constitutionally protected liberty. *Boyd v. United States*, 116 U.S. 616 (1886), cited with approval in *Griswold v. Connecticut*, 381 U.S. 479 (1965).[34] Only after that most basic liberty has been constitutionally diminished by criminal conviction, pretrial detention or civil commitment can certain remaining interests be abridged upon a showing of a rational relation to a legitimate state purpose. *Bell v. Wolfish*, 441 U.S. 520 (1979). Thus, although conditions of confinement must bear only a reasonable relationship to the purposes of confinement, civil commitment itself must be justified by a compelling state interest.

2. *Care and habilitation are each necessary but not sufficient purposes for the constitutional confinement of noncriminal mentally retarded people.*

As is demonstrated below, for mentally retarded individuals who have not been found to have committed a criminal offense, the massive deprivation of liberty which results from commitment can be justified only by the provision of both adequate care and habilitation.

Amici do not agree with petitioners that the state could constitutionally commit mentally retarded people

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[34] Describing the liberty protected by the fourth and fifth amendments to the Constitution, this court recognized in *Boyd v. United States* that it consisted "of the sanctity of a man's home and the privacies of life . . . his indefeasible right of personal security, personal liberty and private property where that right has never been forfeited by his conviction of some public offense. . . ." 116 U.S. at 630.

solely for the purpose of providing them care and that therefore it has an obligation to provide only care. Pet. Br. at 14-19. Neither do *amici* believe that habilitation alone is a constitutionally sufficient purpose for civil commitment of mentally retarded people and that the provision of habilitation alone would justify confinement.[35] In *amici*'s view, the state can constitutionally confine mentally retarded people under its *parens patriae* power only for both the purposes of care *and* habilitation.[36] Once having committed someone for these purposes, the state must provide both care *and* habilitation.

Although the Supreme Court has never directly decided whether institutionalized mentally ill persons have a constitutional right to treatment, the Court has not hesitated to acknowledge that custodial confinement *without treatment* raises "substantial constitutional" questions, even in cases in which confinement can be justified, at least in part, under the police power. *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 250 (1972). *See also In re Gault*, 387 U.S. 1, 22 n.30 (1967).

To permit the commitment of mentally retarded people to an institution for the purpose of care alone, without habilitation, is to permit the state to commit such

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[35] In *O'Connor v. Donaldson*, 422 U.S. 563, 573 (1975), this Court expressly declined to decide this issue.

[36] The *parens patriae* power is "inherent in the supreme power of every state," *Mormon Church v. United States*, 136 U.S. 1, 57 (1890), and is the power exercised when the state acts as guardian of citizens with disabilities. *Hawaii v. Standard Oil of California*, 405 U.S. 251, 257 (1972). It serves as the basis for state laws which protect minors, establish guardianships and provide for involuntary commitment of the mentally disabled. *See generally* Comment, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974) [hereinafter cited as "Developments—Civil Commitment"]. Some argue that alternatively, the state may exercise its police power to protect the public from dangerous mentally disabled people. Whether prevention of dangerous conduct is also a constitutionally necessary and/or sufficient ground for civil commitment is not at issue in this case, which does not challenge the constitutionality of respondent's commitment.

people to a life sentence, for their ability to care for themselves will be enhanced only through improved functioning. Left neglected in an institution without appropriate habilitation programs, mentally retarded people have no prospect of attaining a functional level that will permit their return to the community, either with the assistance of family and friends or with the assistance of state-supported services.

As the Fifth Circuit Court of Appeals observed in *Wyatt v. Aderholt*, 503 F.2d 1305, 1313 (5th Cir. 1974), the massive deprivation of liberty involved in commitment to a mental retardation facility cannot be outweighed by the state's interest in providing care alone, even to those who need care. The state must provide habilitation which gives a reasonable prospect for an improvement in functioning and an increase in individual freedom either within the institution or outside, depending upon the progress of the individual resident.[37] Whether there may be a few mentally retarded people so disabled that they cannot return to the community or improve in any way relevant to their exercise of liberty is not germane, for it has been demonstrated that, generally, institutionalized mentally retarded people can benefit from habilitation and that it is impossible to

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[37] In *Robinson v. California*, 370 U.S. 660 (1962), as well as in subsequent cases, the Supreme Court has made clear that no one may constitutionally be *punished* for the mere "status" of being mentally different, and that confinement of noncriminals, in prison-like institutions, without "treatment" would be an impermissible purpose, violative of the eighth and fourteenth amendments. *Robinson* was concerned with confinement in a "prison." But constitutional rights depend on functional realities, not on the "civil" or "criminal" label which attaches to an institution or procedure. *Specht v. Patterson*, 386 U.S. 605 (1960); *In re Gault*, 387 U.S. 1 (1967). Individuals' rights cannot be abridged merely by "the hanging of a new sign—reading 'hospital'—over one wing of a jailhouse." *Powell v. Texas*, 392 U.S. 514, 529 (1968).

See also Martarella v. Kelly, 349 F. Supp. 575, 599 (S.D.N.Y. 1972), *Welsch v. Likins*, 373 F. Supp. 487, 496 (D. Minn. 1974), *modified*, 550 F.2d 1122 (8th Cir. 1977); *United States v. Jackson*, 306 F. Supp. 4, 6 (N.D. Cal. 1969).

identify ahead of time the few who may not. *See generally* Section I, *supra.*

Furthermore, the state has not chosen to commit all persons who cannot care for themselves, but only those who are in need of "care or treatment" "by reason of [their] mental disabilities." Pa. Stat. Ann. tit. 50, § 4406(a) and (b). These include mentally retarded people who, as discussed above, by definition have deficits in intellectual and social functioning amenable to improvement through habilitation. Unless we are to believe that the state has arbitrarily selected this group for involuntary confinement, we must assume that there is a rational relationship between their mental condition and the purpose of their confinement. That purpose can only be the treatment of their mental disability with the goal of improving their ability to care for themselves.

To hold otherwise would mean that the state could constitutionally commit a person who had need for both care (safety, food, shelter, clothing, etc.) and habilitation (services to enhance intellectual and social functioning) and then could meet his physical health-care needs while ignoring his mental health-care needs. Surely the Constitution makes no such arbitrary distinctions. Consider the situation of a mentally retarded person who, as a result of physical injury, will lose his speech unless a known and available medical procedure is provided; due process requires the state to render needed medical attention. *Estelle v. Gamble*, 429 U.S. 97 (1976). The Constitution does not require less where a mentally retarded person may lose his power of speech as a result of a lack of stimulation and appropriate habilitation.

3. *Due process requires that the nature of involuntary confinement be reasonably related to the purposes of that confinement; respondent thus has a constitutional right to both care and habilitation.*

As noted above, "due process requires that the nature and duration of *commitment bear some reasonable rela-*

tion to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738 (1972) (emphasis added). As demonstrated, care and habilitation are each necessary but not, alone, sufficient purposes for commitment of noncriminal mentally retarded persons; both must be delivered to meet the *Jackson* test. As a district court has observed:

> To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then to fail to provide adequate treatment violates the very fundamentals of due process.

Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1972), *modified sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

Accepting this reasoning, implicitly when not explicitly, the overwhelming majority of courts[38] and legal schol-

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[38] The constitutional right to treatment for mentally ill and mentally retarded people has been recognized by both federal and state courts. *See, e.g., Scott v. Plante*, 641 F.2d 117 (3d Cir. 1981), *petition for cert. filed*, 49 U.S.L.W. 3790 (U.S. April 10, 1981) (No. 80-1099); *Gary W. v. Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976), *aff'd*, 601 F.2d 240 (5th Cir. 1979); *New York State* Association for *Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), *aff'd* 596 F.2d 27 (2d Cir. 1979); *Goodman v. Parwatikar*, 570 F.2d 801 (8th Cir. 1978); *Wyatt v. Stickney*, 325 F. Supp. 781; *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *Flakes v. Percy*, 511 F. Supp. 1325 (W.D. Wis. 1981); *Davis v. Hubbard*, 506 F. Supp. 915 (N.D. Ohio 1980); *Johnson v. Solomon*, 484 F. Supp. 278 (D.Md. 1979); *Eckerhart v. Hensley*, 475 F. Supp. 908 (W.D. Mo. 1979); *Rone v. Fireman*, 473 F. Supp. 92 (N.D. Ohio 1979); *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977); *Steubig v. Hammel*, 446 F. Supp. 31 (M.D. Pa. 1977); *Eubanks v. Clarke*, 434 F. Supp. 102 (E.D. Pa. 1977).

There is also a widening body of precedent holding that there is a constitutional right to treatment for other people committed under "non-penal" statutes for the purpose of care and treatment: (a) juvenile delinquents, *Nelson v. Heyne*, 355 F. Supp. 451, 459 (N.D. Ind. 1973), *aff'd*, 491 F.2d 352, 358 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1976); *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1364 (D.R.I. 1972); (b) "persons in need of

ars [39] that have addressed the issue have recognized a constitutional right to care and treatment for noncriminal mentally ill and mentally retarded persons confined in institutions. *Amici* urge this Court to give its imprimatur to those holdings.

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supervision," *Martarella v. Kelley*, 349 F. Supp. 575, 585, 598-600 (S.D.N.Y. 1972); *M v. M*, 71 Misc. 2d 396, 336 N.Y.S.2d 304 (Fam. Ct. 1970); (c) sexual offenders and defective delinquents, *Director of Patuxent Institution v. Daniels*, 243 Md. 16, 221 A.2d 397, *cert. denied*, 385 U.S. 940 (1966); *Commonwealth v. Page*, 339 Mass. 313, 159 N.E.2d 82 (1959); *In re Maddox*, 351 Mich. 358, 88 N.W.2d 470 (1958); *Stachulak v. Coughlin*, 364 F. Supp. 686 (N.D. Ill. 1973); *Davy v. Sullivan*, 354 F. Supp. 1320, 1329-30 (M.D. Ala. 1973); *Silvers v. People*, 22 Mich. App. 1, 176 N.W.2d 702 (1970); and (d) persons incompetent to stand trial, *United States v. Walker*, 335 F. Supp. 705, 708 (N.D. Cal. 1971); *Nason v. Superintendent of Bridgewater State Hospital*, 353 Mass. 604, 612-13, 233 N.E.2d 908, 913-14 (1968).

[39] The constitutional right to treatment or release for involuntarily committed mental patients has received an unusual amount of scholarly discussion and support. The first articulation of the right is found in Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960). In the last 20 years many law review articles have been published on the subject, almost all of them supporting a constitutional right to treatment or release for the involuntarily confined. *See, e.g., Developments—Civil Commitment, supra* note 36; Rapson, *The Right of the Mentally Ill to Receive Treatment in the Community*, 16 COLUM. J.L. & SOC. PROB. 193 (1980); Dowben, *Legal Rights of the Mentally Impaired*, 16 HOUS. L. REV. 833 (1979); Spece, *Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study*, 21 ARIZ. L. REV. 1049 (1979); Schoenfeld, *A Survey of the Constitutional Rights of the Mentally Retarded*, 32 SW. L.J. 605 (1978); Grant, *Donaldson, Dangerousness, and the Right to Treatment*, 3 HASTINGS L.Q. 599 (1976); Comment, *The Eighth Amendment Right to Treatment for Involuntarily Committed Mental Patients*, 61 IOWA L. REV. 1057 (1976); Note, *Rights of the Mentally Ill During Incarceration—the Developing Law*, 25 U. FLA. L. REV. 494 (1973); Robitscher, *Right to Psychiatric Treatment: A socio-Legal Approach to the Plight of the State Hospital Patient*, 18 VILL. L. REV. 11 (1972); Katz, *The Right to Treatment—An Enchanting Legal Fiction*, 36 U. CHI. L. REV. 755 (1969).

B. Where the State Has Assumed Custody of a Noncriminal Mentally Retarded Person for Whatever Reasons, It Has a Constitutional Obligation To Protect Him From Harm by Meeting His Fundamental Needs, Including His Needs for Personal Security and Appropriate Habilitation.

1. *The state has a due process obligation to protect respondent from attacks.*

The eighth amendment prohibition against cruel and unusual punishment has been held to preclude conditions of penal confinement which result in "serious deprivations of basic human needs," *Rhodes v. Chapman*, 49 U.S.L.W. 4677, 4679 (U.S. June 15, 1981) (No. 80-332).

The protection from harm that would be required for respondent if he were a prisoner includes protection from attack by other prisoners, *see Hutto v. Finney*, 437 U.S. 678 at 687 (1978), and from systemic abuses like those alleged here. *See, e.g., Haines v. Kerner*, 404 U.S. 519 (1972) (confinement conditions aggravating pre-existing physical illness and injury); *Jones v. Wittenberg*, 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972) (neglect of basic needs for food, air, sanitation and exercise).

While the concepts of "dignity, civilized standards, humanity and decency" embodied in the eighth amendment, *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), *quoting Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968), are not directly applicable to nonpenal institutions, *Ingraham v. Wright*, 430 U.S. 651, 669 (1977) and *Bell v. Wolfish*, 441 U.S. 520, 537 (1979), the conditions of confinement required by the eighth amendment in prisons must surely be included among the due process obligations imposed on state facilities for the mentally retarded. Due process does not require less from officials charged with the incarceration of innocent people who are afflicted with deficiencies in intellectual capacity than it does from jailers of convicted criminals. Indeed, this Court has consistently held that, outside of the prison context, the liberty protected by due process encompasses the "right to be

free from and to obtain judicial relief for unjustified intrusions on personal security." *See, e.g., Ingraham v. Wright*, 430 U.S. at 673 (1977).

No intrusions on the personal security of an institutional resident can be more unjustified than assaults by fellow residents which the state could prevent through adequate supervision and the provision of appropriate programs. Every lower federal court that has considered the question has determined that state officials who are responsible for operating institutions for the retarded or mentally ill have a duty to protect involuntarily committed persons from repeated attacks by other residents.[40]

Therefore, the court of appeals correctly held that respondent had a due process right to protection from harm which included the right to protection from attack by other residents.

2. ***The state has a due process obligation to provide respondent with habilitation programs to prevent loss of skills.***

Assuming that a mentally retarded person has a constitutional right to protection from harm, he necessarily has a right to habilitation. Although respondent was improperly deprived of the opportunity to offer such evidence at trial, mental retardation professionals believe that without a meaningful habilitation program, the mentally retarded residents of institutions will inevitably suffer regression and the loss of functioning skills. *See* section I, C, *supra*. Even with a humane environment, good nutrition and protection from assault, mentally retarded people will lose such vital skills as verbal com-

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[40] *See, e.g., Rogers v. Okin*, 634 F.2d 650, 655-56 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3788 (U.S. April 20, 1981) (No. 80-1417); *Goodman v. Parwatikar*, 570 F.2d 801 (8th Cir. 1978); *Harper v. Cserr*, 544 F.2d 1121 (1st Cir. 1976); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1978); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *New York State Association for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973).

munication, walking and toilet training unless they are continually challenged to maintain those skills through a properly designed habilitation program. *See Battle v. Commonwealth*, 629 F.2d 269 (3d Cir. 1980), *aff'g Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979), *cert. denied*, 49 U.S.L.W. 3954 (U.S. June 22, 1981) (No. 80-827); *Wyatt v. Stickney*, 344 F. Supp. 387, 391 (M.D. Ala. 1972).

One federal court has explained that "there is no bright line separating" the right to treatment from the right to protection from harm. *New York State Association for Retarded Children v. Carey*, 393 F. Supp. 715, 719 (E.D.N.Y. 1975) (approving consent judgment affecting the Willowbrook developmental center). The court there accepted the stipulation of the parties that "a certain level of affirmative intervention and programming is necessary *if* [*the*] *capacity for growth is to be preserved, and regression prevented.*" *Id.* (emphasis added). In *amici*'s view, the Willowbrook opinion accurately describes the inextricable relationship between habilitation and protection for the mentally retarded.

IV. NONTHERAPEUTIC SHACKLING OF AN INVOLUNTARILY INSTITUTIONALIZED MENTALLY RETARDED PERSON VIOLATES HIS DUE PROCESS RIGHT TO BE FREE FROM PUNISHMENT.

The court of appeals properly found that the trial court erred by charging the jury that petitioners' alleged shackling of Nicholas Romeo to his bed for up to 12 hours per day, purely for staff convenience, must be judged solely by the cruel and unusual punishment standard of the eighth amendment. *Amici* agree with respondent's position in this Court that petitioners must justify the use of shackles on an institutionalized mentally retarded person by demonstrating that a compelling state interest necessitates their use. However, it is beyond question that a mentally retarded person involuntarily committed to a state institution has a right to be free

from punishment under the due process clause of the fourteenth amendment. *Bell v. Wolfish*, 441 U.S. 520 (1979). Even under this less protective standard, the respondent is entitled to a remand for a new trial.

In a prison, punishment is a permissible state purpose. Nonetheless, the Court will review conditions of confinement in a prison to be sure that the eighth amendment prohibition against "cruel and unusual" punishment is not violated. *See Rhodes v. Chapman*, 49 U.S.L.W. at 4679; *Estelle v. Gamble*, 429 U.S. at 102 (1976).

In the case of persons confined without criminal conviction, this Court has examined conditions of confinement on a higher standard. *Bell v. Wolfish*, 441 U.S. 520 (1979), held that individuals confined prior to trial, without an adjudication of guilt, retain a right to be free from punishment under the due process clause.

Clearly, if punishment is impermissible for pretrial detainees after a determination of probable cause that they have committed a crime, punishment cannot be permissible for mentally retarded persons who are confined without being accused or convicted of any crime. As this Court noted in *Addington v. Texas*, "In a civil commitment state power is not exercised in a punitive sense." 441 U.S. 418, 428 (1979).

Of course, not every restriction imposed on residents in a state mental retardation institution amounts to punishment. Certain deprivations are a necessary part of confinement itself; others may be justified by legitimate state habilitation or protection purposes. Under the test set forth by this Court, to determine whether a challenged restriction is punishment, the trial court must first determine whether the restriction is imposed with a punitive motive. Even if plaintiffs have no evidence that state officials intended to punish, the trial court must go on to determine "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Bell v. Wolfish*, 441 U.S. at 538, *quoting Kennedy v. Men-*

doza-Martinez, 372 U.S. 144, 168-69 (1963). Thus, even when concededly legitimate state interests are put forward, the trier of fact must determine if the state has acted excessively harshly "to achieve objectives that could be accomplished in . . . alternative and less harsh methods." *Bell v. Wolfish*, 441 U.S. at 539 n.20. If so, an impermissible intent to punish may be inferred by the finder of fact. *Id.*

Applying these standards to petitioners' shackling of Romeo, *amici* believe that a properly instructed jury which had been permitted to hear all the testimony offered by the respondent could reasonably have concluded that petitioners' actions were punitive and had violated Romeo's due process rights.[41] However, the careful scrutiny required by *Bell* was effectively precluded by the trial court's improper exclusion of the expert testimony offered by respondent, which would have shown that the shackling lacked any habilitation rationale and instead was used for the convenience of staff.

Amici agree that habilitation which meets acceptable professional standards can provide a legitimate

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[41] In addition to the obvious severe deprivation of freedom of movement involved in shackling, a mentally retarded person shackled to a bed without attention, training or amusement quickly loses skills learned in programs or in a more normal environment, *see* notes 26, 27 & 28, *supra*, and may develop maladaptive or self-abusive behavior. Baumeister, *Origins and Control of Stereotyped Movements*, in QUALITY OF LIFE IN SEVERELY AND PROFOUNDLY RETARDED PEOPLE: RESEARCH FOUNDATIONS FOR IMPROVEMENT 353, 353-55 (C. Meyers ed. 1978); Forehand & Baumeister, *Body Rocking and Activity Level as a Function of Prior Movement Restraint*, 74 AM. J. MENTAL DEFICIENCY 608 (1970); Bigelow, *supra* note 5, at 42. Finally, studies have shown that shackling can cause serious physical injury. Picker, Poling & Parker, *A Review of Children's Self-Injurious Behavior*, 29 PSYCHOLOGICAL RECORD 435, 440 (1970); Guirguis, *Management of Disturbed Patients: An Alternative to the Use of Mechanical Restraints*, 60 J. CLIN. PSYCH. 295, 297 (1978) ("[p]hysical injury . . . at times can be irreversible"); Horner & Barton, *Operant Techniques in the Analysis and Modification of Self-Injurious Behavior: A Review*, 1 BEH. RESEARCH OF SEVERE DEV. DISABILITIES 61, 65 (1980).

justification for the use of restraints.[42] But under the shocking facts alleged in this case, and in view of the historic abuse of physical restraints in institutions,[43] in-

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[42] The permissible uses of restraint as an habilitation modality for mentally retarded persons are strictly limited. Restraints are properly used as a part of an habilitation program to remedy behavior which is seriously damaging to the individual or to others around him. Responsible clinicians view restraint as a treatment of last resort, where other techniques have been tried and have failed, Bigelow, *supra* note 5, at 43; National Association for Retarded Citizens, GUIDELINES FOR THE USE OF BEHAVIORAL PROCEDURES IN STATE PROGRAMS FOR RETARDED PERSONS (1976) [hereinafter cited as "NARC Guidelines"]. Petitioners do not contend that Romeo was restrained because he posed an imminent danger to the physical safety of himself, to staff or to other residents. The use of restraints in such an emergency situation would be justifiable.

By contrast to the use of shackles imposed on Romeo, an habilitation program using restraints aims to teach more appropriate forms of behavior. It is carefully planned by professional staff to discourage maladaptive behavior and to reward appropriate behavior and must be systematically applied and closely supervised. Moreover, to avoid the possibility of misuse, the professional literature recommends the use of strict guidelines specifying the maximum duration of the treatment and the conditions for release, and requiring staff to keep detailed records tracking the patient's progress. NARC Guidelines, *supra* at 27-28, 35; *see* BEHAVIOR MODIFICATION PROCEDURE: A SOURCEBOOK (E. Thomas ed. 1974).

These guidelines are recognized in the regulations governing use of restraint at Pennhurst, Tr. 5-229 - 5-230, and reflected in federal regulations governing the use of physical restraint in mental retardation facilities receiving Medicaid funds, 42 C.F.R. § 442.441 (limited to no longer than one hour). Defendants do not contend that they followed these procedures in the shackling of Nicholas Romeo.

[43] The professional literature acknowledges great potential for abuse of shackles for nontreatment reasons such as punishment or convenience. Guirguis, *supra* note 41, at 297 ("[a]t times staff can act out their own conflicts by way of punishing the patient"); NARC Guidelines at 35. The isolation of state mental retardation facilities from public scrutiny has historically fostered abuses unheard of in more open settings. Gardner, *Use of Punishment Procedures with the Severely Retarded: A Review*, 74 AM. J. MENTAL DEFICIENCY 86, 87 (1979).

cluding Pennhurst,[44] careful scrutiny of defendants' claims here was essential to distinguish punishment from legitimate treatment.[45]

In *amici*'s view, respondent should have been allowed to offer evidence that he was restrained because his behavior was annoying to staff and because it was easier to tie him down than to supervise or teach him.

The use of shackling solely for the convenience of staff simply cannot pass constitutional muster. Although administrative convenience would be another legitimate state purpose, the use of a means so harsh to achieve this purpose cannot be justified. *Bell v. Wolfish*, 441 U.S. at 539 n.20 (1979). Where training programs can easily be used to remedy an institutional resident's behavioral problems,[46] tying him to a bed for up to 12 hours a day over a year-long period is so disproportionate a response that it is impossible to view it as anything other than punishment under the standards established by this Court.

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[44] *See Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. at 1306-07.

[45] The technical use of the term "punishment" by some behavior modification experts to mean aversive procedures must not be confused with the term as used in the decisions of this Court cited above.

[46] *See* section I, C, *supra*; Baumeister, *supra* note 41, at 367, 379; Warren & Burns, *Crib Confinement as a Factor in Repetitive and Stereotyped Behavior in Retardation*, 8 MENTAL RETARDATION 25 (June 1970); Grabowski & Thompson, *supra* note 29.

If these techniques fail, time-out procedures (separating the resident briefly from activities he enjoys when he misbehaves), over-correction (requiring the restitution of misbehavior and repeated practice of correct behavior) and aversive conditioning (using planned aversive stimuli each time misbehavior occurs) have proven effective in eliminating even severely disruptive or self-abusive behavior patterns without resorting to the use of long-term restraint. Baumeister, *supra* note 41; Schroeder, Mulick & Schroeder, *Management of Severe Behavior Problems of the Retarded*, in HANDBOOK OF MENTAL DEFICIENCY: PSYCHOLOGICAL THEORY AND RESEARCH (N. Ellis ed. 1979); FOXX & AZRIN, *supra* note 30.

V. THE COURT OF APPEALS DID NOT ERR IN REMANDING THE CASE TO THE DISTRICT COURT FOR RESOLUTION OF THE QUALIFIED IMMUNITY QUESTION.

Amici support the qualified immunity which previous decisions of this Court give to state officials working in public facilities. In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court articulated a two-part test for qualified immunity. Under that test, an official is not immune:

> [I]f he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [person] affected or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [person].

Id. at 322. Petitioners have represented that the second "subjective" part of the immunity test, which is a question of fact, is not at issue in this case. However, the question of malice was clearly raised on the record and evidence of malice was offered. Whether petitioners are liable under the "subjective" malice test is a question of fact for a jury to decide. *Procunier v. Navarette*, 434 U.S. 555 (1978); *see, e.g.*, Pet. App. at 90A; Tr. 2-130; Pet. App. 14a, n.20; Tr. 6-161.

The American Psychiatric Association, as *amicus*, has argued that state employees who are powerless to comply with constitutional mandates should be immune from damage suits. American Psychiatric Association Br. 24-26. But this is not a proper case in which to consider that policy argument because petitioners testified at trial below that the staff was wholly adequate to provide respondent with habilitation programs and supervision. Tr. 5-173, 6-12, 135-36. In any event, to adopt that approach would be to loosen the *Wood v. Strickland* standard and to immunize even those employees who knowingly violate the constitutional rights of the vulnerable residents of public facilities.

Amici believe that, as a policy matter, institutional residents must be able to recover damages against state employees who knowingly violate their constitutional rights. "Any lesser standard would deny much of the promise of § 1983." *Wood v. Strickland*, 420 U.S. at 322; *Owens v. City of Independence*, 445 U.S. 622 (1980). Furthermore, in Pennsylvania, as in many other states, public employees are indemnified by the state for nonmalicious civil rights liability. Thus, in fact, the penalty falls where it should—upon the state, which failed to provide resources sufficient to comply with constitutional requirements. But, as Congress recognized in passing 42 U.S.C. § 1983, the victim's only resourse is often an action for damages under the Civil Rights Act.

CONCLUSION

Because respondent was precluded by the trial court from introducing expert testimony to establish violations of his constitutional rights to appropriate habilitation, to protection from harm and to freedom from punishment, *amici* join respondent in respectfully urging this Court to affirm the court of appeals' reversal of the district court judgment and its remand of the case.

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CERTIFICATION OF SERVICE

I, Margaret F. Ewing, hereby certify that on September 23, 1981, I served by mail one copy of the foregoing Brief of *Amici Curiae* on Edmond A. Tiryak, Community Legal Services, 3638 N. Broad Street, Philadelphia, Pa., 19104, Counsel for Respondent, and on David H. Allshouse, Deputy Attorney General, Office of the Attorney General, 1641 Strawberry Square, Harrisburg, Pa., 17120, Counsel for Petitioners.

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